

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Sandwich Isles Communications, Inc.)	WC Docket No. 09-133
Petition for Declaratory Ruling)	

**COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. (NECA)**

The Wireline Competition Bureau issued a *Declaratory Ruling* that determined the amount of investment in submarine and related cabling installed by Sandwich Isles Communications, Inc. (“SIC”) that should be included in NECA cost pools.¹ AT&T Inc. filed an application for review, and SIC filed a petition for reconsideration of that ruling.² The Bureau found that NECA had acted properly in its treatment of SIC’s costs, although it exercised its own judgment regarding the amount to be included. NECA is implementing the Bureau’s ruling, which allows a higher amount of costs than NECA originally included.³

¹ *Sandwich Isles Communications, Inc., Petition for Declaratory Ruling*, Declaratory Ruling, WC Docket No. 09-133, DA 10-1880 (Com. Car. Bur., rel. Sept. 29, 2010)(“*Declaratory Ruling*”).

² Application for Review of AT&T, Inc., WC Docket No. 09-133 (filed Oct. 28, 2010); Sandwich Isles Communications, Inc., Petition for Reconsideration, WC Docket No. 09-133 (filed Oct. 29, 2010)(“SIC Petition”).

³ Although NECA only comments here on certain specific issues raised by SIC in its petition for reconsideration, silence on other issues does not mean that NECA agrees with other SIC arguments. NECA’s full position on the issues has previously been stated in this docket. *See, e.g.*, Comments of the National Exchange Carrier Association, Inc. (NECA), WC Docket No. 09-133 (filed Aug. 31, 2009); Reply Comments of the National Exchange Carrier Association, Inc. (NECA), WC Docket No. 09-133 (filed Sept. 10, 2009).

SIC argues for the first time in its Petition that NECA failed to consider one of its guideline papers related to the accounting treatment of spare fiber cable and wire facilities⁴ in its determination that only a portion of SIC's submarine and related investment should be allowed in the rate base. In particular, SIC argues this determination was inconsistent with NECA's guidelines identifying the separations treatment of spare fibers.⁵ SIC introduced this evidence for the first time on reconsideration. Although it argues that its lawyers were unaware of the document, it never argues that its client or the client's consultant, GVNW Consulting, did not have access to the document. In fact, SIC was emailed a copy of this guideline in 2004 when it was issued.⁶ Additionally, this document has been available to all members and member consultants since 2004 on the member's portion of NECA's website.⁷ FCC rules prohibit the introduction of evidence for the first time in a petition for reconsideration absent special circumstances.⁸ Given that none of these special circumstances exist here, the FCC should strike any reference to the spare fiber guideline pursuant to this rule.

Even if the FCC were to examine this new fact, the spare fiber guideline is irrelevant to a determination of whether a particular investment is "used and useful." First, even if it were true

⁴ SIC Petition, Exhibit A (Harper Declaration), Exhibit A ("Spare Fiber C&WF Investment, Cost Reporting Guidelines").

⁵ SIC Petition at 2.

⁶ See Appendix A. SIC's consultant, GVNW Consulting, also received copies of the guideline during the same time period.

⁷ See Affidavit of James W. Frame, Vice President of Operations, NECA, Appendix B.

⁸ 47 C.F.R. § 1.106(l) ("No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or the designated authority believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section."). Given that the evidence is irrelevant as demonstrated herein, the evidence should not have been taken into account in the original declaratory ruling proceeding. It is irrelevant that SIC's lawyers may not have known about the accounting guideline because the rule applies to a party (as well as to the agents acting on the party's behalf).

that the spare fiber guidelines were inconsistent with NECA's original decision to limit SIC's investment included in NECA pools, that fact is not decisionally significant. The Commission, not NECA, possesses ultimate decision making authority on what costs are "used and useful," as well as the ability to set and interpret rules to be followed in setting rates.⁹ Because the Bureau's decision necessarily trumps any NECA guideline, the guideline provides no basis on which to dispute the *Declaratory Ruling*.

Second, NECA guidelines provide advice to member companies that generally address issues associated with the treatment of specific costs. In particular, the cost guidelines presume that the investment is required by subscribers in order to obtain regulated services of the carrier, i.e., is "used and useful." As a consequence, SIC is incorrect in stating that the spare fiber guideline represents an all encompassing legal conclusion requiring that all investment, including spare fibers, be included in the ratebase, regardless of other FCC policies.¹⁰

Third, the Bureau found that only 50 percent of the disputed lease and related costs should be included in NECA's pool, because the remainder was not "used and useful".¹¹ This finding is not based on the specific amount of fibers used, or the spare fibers available, but rather focuses on the total amount of costs associated with the lease SIC seeks to include in NECA pools. The Bureau found that the overall amount of costs was not justifiable given SIC's failure

⁹ *July 1, 2004 Annual Access Charge Tariff Filings*, WC Docket No. 04-372, 19 FCC Rcd 23877 (2004).

¹⁰ The Commission has frequently adjusted amounts booked to accounts when it believed that the specific circumstances of the case required that certain accounting costs not be included in ratebase. *See, e.g., 1997 Annual Access Tariff Filings*, Memorandum Opinion & Order, CC Docket No. 97-149, 13 FCC Rcd 5677, ¶ 67 (Com. Car. Bur., 1997)(cash working capital); *Annual 1990 Access Tariff Filings*, CC Docket No. 90-320, Memorandum Opinion And Order, 5 FCC Rcd 4177, ¶¶ 84-87 (Com. Carr. Bur. 1990)(depreciation). It accomplished basically the same result through the *Declaratory Ruling*.

¹¹ *Declaratory Ruling*, ¶ 9.

to demonstrate existing and reasonably anticipated demand.¹² Thus, the specific amount of spare fibers is not relevant to the *Declaratory Ruling* finding.

SIC also asserts that NECA “lacked candor” and “misled the Bureau by failing to advise the Commission” of the spare fiber guideline paper.¹³ This allegation is unconscionable.

Because the spare fiber cost guidelines are irrelevant to the case at hand, NECA was under no duty to produce them in the context of this proceeding. In addition, as demonstrated earlier, SIC has had access and has been aware of this document since at least 2004, so it could have introduced the document when it first filed its request for declaratory ruling.

For the foregoing reasons, NECA believes SIC’s argument that NECA’s spare fiber guideline is relevant to this proceeding is wrong and its ‘lack of candor’ allegation should be rejected.

Respectfully submitted,

By: /s/ Gregory J. Vogt

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December 6, 2010

¹² *Id.*, ¶¶ 22, 25. Given the Bureau finding that only a portion of the lease was reasonable, it is irrelevant that incremental costs of the cable itself were small for the inclusion of additional fibers. SIC Petition at 8-9. SIC makes no attempt to dispel the Bureau’s conclusion that a prudent investor would seek partners in the underlying cable so that the entire cost to regulated services for SIC would be lower, and therefore reasonable. *Id.*, ¶¶ 23 & 25 nn. 86, 87.

¹³ SIC Petition at 1-2.

Appendix A

From: [Cost Issues](#)
To: abbyt@sandwichisles.com
Subject: New Cost Guidelines Paper
Date: Friday, March 05, 2004 3:05:13 PM
Attachments: [Spare fiber CWF facilities paper_030504.doc](#)

To: Cost Issues Manual holders
From: NECA HQ Cost Issues Group

Attached is a new cost guidelines paper regarding the categorization of spare fiber cable & wire facilities investment. This paper is also posted on the NECA.org website in Tools/Cost Issues/Cost Guidelines Papers.

Please contact your NECA region representative with questions on this paper.

Please reply with any problems with this transmission.

Thanks,

HQ Cost Issues

Appendix B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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Declaration of JAMES W. FRAME

I, James W. Frame, am Vice President of Operations for the National Exchange Carrier Association, Inc. I have held my current position since October 1, 1997.

NECA routinely places on the members section of its web site, www.neca.org, its cost reporting guidelines. In particular, in March of 2004, NECA placed on the members section of its web site, the document entitled "Spare Fiber C&WF Investment, Cost Reporting Guidelines," which is appended as Appendix A to SIC's petition for reconsideration in the captioned-proceeding. This document was available to all member companies as well as authorized consultants, such as GVNW Consulting, continuously since that time.

I declare under penalty of perjury that the forgoing declaration is true and correct to the best of my knowledge and belief.



James W. Frame

December 2, 2010

Certificate of Service

I, Gregory J. Vogt, do hereby certify that I have on this 6th day of December 2010 caused a copy of the foregoing "Comments of National Exchange Carrier Association to be served by electronic and first class mail upon the following:

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